No. 239.

Brief of Finley for P. E.

Filed Dec. 9, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

Error to the Supreme Court of Florida.

James Johnson, Plaintiff in Error.
vs.
Geo. F. Drew, Defendant in Error.

BRIEF OF S. Y. FINLEY,
Attorney for Plaintiff in Error.

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James Johnson, Plaintiff in Error.

vs.

Geo. F. Drew, Defendant in Error.

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Attorney for Plaintiff in Error.

STATEMENT.

Defendant in error George F. Drew, brought an action of ejectment in the Circuit court of Hillsborough county, Florida against the plaintiff in error, James Johnson, to recover possession of lot eight of section 19, Township 29, South Range 19 East; and lot 7 of section 24 in Town ship 29, South Range 18 East, situation in Hillsborough county Florida, and containing in all 40.19, acres of land. At the trial of said cause in said Circuit court the said George F. Drew, the plaintiff therein obtained judgment against the defendant in said Circuit court: The said James Johnson, appealed from the said judgment of the said Circuit court of Hillsborough county to the Supreme court of the State of Florida. The Supreme court of Florida affirmed the said judgment of the said Circuit court of Hillsborough county, Florida, a writ of error was applied for and granted for a review of said judgment and decision of the said Circuit and Supreme court of Florida by this, the Supreme court of the United States.

The defendant in said Circuit court, the plaintiff in error in this court, for defence in said action of ejectment filed the plea of "not guilty," and also a plea on equitable grounds. A demurrer was sustained to the latter plea, and an amended plea on the same grounds was offered to be filed in the same action in said Circuit court, but was refused by said Circuit court for the reason assigned, viz. "that it presented no equitable defense."

The Supreme court of Florida affirmed said judgment of said Circuit court upon a consideration of said amended equitable plea, which in substance, alleged as follows: That the land sued for was situated within the Ft. Brooke Military reservation of the United States at Tampa Florida, and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry of the land in question made in the United States land office at Gainesville Florida by Louis J. Brush, the plaintiff's grantor, with Valentine scrip: that at the time of the said location and entry of said land and at the time of the issuance of the patent for the same to said Brush, the defendant was in the actual occupancy and possession of said land, and was residing upon it with his family, as a home, that the defendant had settled upon, and was in the actual possession of said land, it being a portion of said Ft. Brooke Military Reservation, prior to the location of said reservation in the year 1877, and prior to the location of the said reservation in the year 1878, and had settled thereon prior to January first 1884, in good faith for the purpose of securing a home, and of entering the same under the general land laws of the United States, and continued in such occupancy from a period prior to the first day of January 1884 to the time of the approval of the act of Congress of July 5th, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereoff; That at the time of the said pretended location and entry of said land with Valentine scrip by the plaintiff's grantor, and of the issuance of said patent to him, said land was occupied by defendant as aforesaid, and was appropriated, and was not then, and is not now, unoccupied and unappropriated public land of the United States, as required, specified and limited by the act of Congress in such cases made and provided, in authorizing the location of said script: that at the time of said pretended entry of said land and of the issuance of said patent to the plaintiff's grantor, said land had not been surveyed under the direction and control of the General Land Office of the United States, and that said entry

was made upon tracts less than the subdivisions provided for in the United States land laws, and did not conform to the general system of the United States land survey: that at the time of the said entry of said land with Valentine scrip, and of the issuance of said patent to the plaintiff's grantor, said land was within the jurisdiction of the war department of the United States, and not within the jurisdiction of the land department of the United States. And the defendant alleges that said patent is in fraud and violation of the acts of the Congress of the United States, and of the rights of the war department; and that said patent is void, and vests no legal or equitable title, nor right of possession in and to said land in the plaintiff; and that defendant, by virtue of said acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of the said land mentioned in the plaintiff's declaration.

The plaintiff in error sought to defend said action of ejectment upon the grounds set up in said amended equitable plea The judge of said Circuit court would not allow said amended equitable plea to be filed on the grounds assigned by said Circuit court, that the same presented no equitable defense. And the Supreme court of Florida sustained the said Circuit court of Hillsborough county in denying to the plaintiff in error any protection by reason of the allegations in said plea contained.

Specification of Errors.

1st Error.—That the Supreme court of Florida erred in affirming said judgment of the said Circuit court of Hillsborough county, Florida, in said cause.

2nd Error.—That the Supreme court of Florida erred in sustaining the ruling of the Judge of the said Circuit court sustaining plaintiff's demurrer to defendant's equitable plea filed in said cause, and in refusing to allow the defendant to file the amended plea set out in the record, and said Supreme court of Florida erred in it's opinion and judgment in this, that it sustained the ruling of the Judge of the court below in precluding the plaintiff in error, who was defendant in the said action of ejectment, from interposing any of the grounds of defense set up in said equitable and amended equitable plea, and in refusing to allow the said defendant on the trial of said cause to prove that he was in the actual occupancy of the land involved in said suit at the time the plaintiff's grantor located and entered the same with Valentine scrip; and in refusing to allow the said defendant to prove by documentary evidence from the

land department and the war department of the United States, that at the time of the entry thereof by the plaintiff's grantor with Valentine scrip said land was appropriated by the United States government as a military reservation.

3rd error.—And that the Supreme court of Florida erred in denying to the plaintiff in the error the right to impeach the patent under which the plaintiff in the court below claimed title, by showing that the land in question at the time said patent was issued to the plaintiff's grantor was in the possession and occupancy of the plaintiff in error, claiming and occupying the same as his home, and endeavoring to perfect the same under the public land laws of the United States; and in denying the right of the plaintiff in error to impeach said patent by proof that the said patent was illegially issued by the land department of the United States upon a location of Valentine scrip thereon whilst the same was under the appropriation of the United States as a military reservation, in violation of the act of Congress of April 5th, 1872.

4th error.—And also that the Supreme court of the State of Florida erred in denying to the plaintiff in error the rights claimed by him in his said amended equitable plea under the act of Congress of July 5th, 1884.

5th, error.— And also that the said Supreme court of Florida erred in denying the right to the plaintiff in error, as defendant in said action of ejectment, to prove his occupancy of said land, and his bonafide possession of said lands under the public land laws of the United States. at the time said land was entered with Valentine scrip, and at the time said patent was issued to the plaintiff's grantor and at the time said action in ejectment was commenced;and in holding that the claim of the plaintiff in error was not shown to be in privity with the government, and that he was a mere trespasser on said land and, as such, could not be heard to question the legality of the issuance of said patent by the land department of the United States.

6th error.—And also that the Supreme court of Florida erred in refusing to reverse the judgment of the Circuit court of Hillsborough County, Florida, in said cause, because of the erroneous charges given by said Circuit court to the jury in behalf of the plaintiff at the request of plaintiff's counsel in words and figures as follows; viz: Charge No. 1 for the plaintiff. That a patent from the government of the United States is the highest evidence of titl and is conclusive, as against the government and all persons claiming

under title acquired since the issuing of the patent, until set aside or annulled or unless it is absolutely null and void."

2nd. Charge given for the plaintiff. "That in a suit of ejectment the holders of such a patent must prevail against all other persons not having a legal title older than such a patent." 3rd. Charge given for the plaintiff. And you are instructed that bare possession by a person of a tract of land at the time of the issuing of a patent to another person does not create any right in the person so in the possession as against the patent held by such other persons."

4th. Charge given for the plaintiff. That if the jury believe from the evidence in the case, that the plaintiff holds a patent from the government of the United States for the land in controversy, or is a grantee of a party who so holds a patent for the lands from the government of the United States that they must find for the plaintiff, unless defendant has produced in evidence a prior patent, or a legal title of a date prior to the issuing of the patent to the plaintiff or his grantor.

5th. Charge for the plaintiff. That the bare possession of the defendant, although he may have been on the land prior to the issuing of the patent, does not entitle him to come into a court of law and defend, as against such patent, nor does he by said possession acquire such right as would entitle him to question the legality of such patent.

7th, error.—And also the Supreme court of Florida erred in refusing to reverse the judgment of the Court below because the Judge of said Circuit court refused to charge the jury as requested by the defendants counsel as follows: viz. Charge No. 2, asked for by the defendants counsel and refused by the court.

"In this action before the plaintiff can recover it must be shown by the evidence, not only that the title to the land in question was at the commencement of said suit in the plaintiff, but also that the plaintiff had the right of possession at the time of the trial,"

8th, error.—And also that the Supreme court of Florida erred in affirming the judgment in the court below, and in refusing to reverse the same on the grounds that the Judge of the court below refused to charge the jury at the request of the defendants counsel, as follows; viz; Charge No. 4 requested by the defendant and refused by the court.

"If you find from the evidence that the plaintiff derives title from Louis J. Brush, and that Louis J. Brush procured a patent from the United States for the land in question

by the loction of Valentine scrip, thereon, and if you further find from the evidence that at the time of such location and purchase of the said land by the said Brush, that said land was in the actual possession of the defendant, and that the defendant was then occupying the same as his home, openly and notoriously, claiming and cultivating and improving the same, and exercising ownership thereof, then in such case, the court charges you that such location and purchase of said land with Valentine scrip would be illegal, and, as against the defendant in possession, would not vest in said Brush nor the plaintiff claiming under him, either the title or the right of possession in and to the land in question, and you should find for the defendant."

Charge No. 5. asked for by the defendants counsel, and refused by the court. "If you find from the evidence that the plaintiff claims title through a patent issued to Louis J. Brush, and if you further find from the evidence that said patent was obtained with said scrip by said Brush and if you further find from the evidence that at the time of such location of said land with Valentine scrip, said land was not UNAPPROPRIATED land of the United States; then such patent would be ILLEGALLY issued, and would convey no title or right of possession to said Brush, or to the plaintiff claiming under him."

Charge No. 6, asked for by the defendant's counsel, and refused by the court. "If you find from the evidence that the patent upon which the plaintiff relies was illegally issued by the officers of the land department in violation of the act of congress, in such cases made and provided, and that the defendant was in actual occupancy of said land, and settled thereon prior to January 1st. 1884, in good faith for the purpose of securing a home, and entering the same under the general land laws of the United States, and has continued in such occupancy of the said land up to, and including the 5th. day of July 1884' and up to the present time, and is by law entitled to make a homestead entry thereon, and that said land was a part of the Fort Brooke Military reservation, at Tampa Florida, and that said land were subject to the entry under the public land laws at the time of their withdrawal, then you should find for the defendant."

9th. error.—And also that the Supreme court of Florida erred in affirming the judgment of the court below, and in refusing to reverse the same on the grounds that the Judge of the trial court excluded such evidence as tended to prove said equitable pleas, viz. "That at the time of the entry

of said land by plaintiff's grantor, and of the issuance of said patent the defendant was in the occupancy of said land, and that the defendant settled upon said land in good faith prior to January 1st.1884, and continued in that possession up to, and including the 5th. day of July 1884 with the intention of making it his home and entering it under the general land laws of the United States. That the defendant was then qualified and entitled to make a homestead entry. and to enter said land. And that at the time of the location of said Valentine scrip on said land by the plaintiff's grantor. and at the time of the issuance of said patent to the plaintiff's grantor, and at the time of the commencement of the said suit and of the trial, the defendant was bonafide settler upon said land, and had an inchoate right to the same as against individuals, though not as against the government. And that said land was at the time of the issuance of said patent and of the location of said scrip under the jurisdiction and control of the war department of the United States and within the Fort Brooke Military reservation of Florida.

10th. error.—And also that the Supreme court of Florida erred in refusing to reverse the judgment of the court below on the ground that the judge of the trial court refused to grant the defendant a new trial on the grounds set up in his motion for a new trial.

Brief of Argument of Counsel for Plaintiff in Error.

In behalf of the plaintiff in error we first ask the consideration of the 1st, 2nd, 3rd, 4th, and 5th, grounds of error. (Record page 67 and 68.) These grounds taken together, embrace the substance of the law of the case, and involve the correctness of its disposition by the Circuit and Supreme court of Florida.

The plaintiff in error sought to defend said action of ejectment upon the grounds contained in his amended equitable plea. (See Record page 55.)

The Statute of Florida authorizes an equitable plea in actions of ejectment. (See McLellans Digest Laws of Florida, section 61, page 827) which reads as follows; "It shall be law ful for the defendant or plaintiff in any cause in any of the courts of this State in which, if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and the said courts, are hereby empowered to receive such a plea, provided, such a plea shall begin with the words, "For defence on equitable grounds" or words to the like effect. Section 64, page 827. McClellans Digest which reads as follows. "In case it shall appear to the court or a Judge that any such equitable plea cannot be dealt with by a court of law. so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out on such terms as to costs and otherwise as to such court or judge may seem reasonable."

The doctrine of the Supreme court of Florida as to an equitable plea in ejectment is stated and referred to in the Record on page 57, and on page 60 of the record the Supreme court of Florida held that all the available defense sought to be set up by the equitable plea could be relied upon as legal defence under the general issue. See Record page 60.

The question then recurs, does the said amended equitable plea referred to, page 55 of the record, set up a defense to the said action of ejectment. And if so, was the defendant in the court below in a situation to attack the patent offered in evidence by the plaintiff in the court below?

It is conceded that the plaintiff in the State trial court relied upon a patent for the land in question issued to Louis J Brush, as assignee of Thomas B. Valentine, by virtue of the act of Congress of April 5th, 1872. (See Record page 14, 15, 60 and 61.)

A brief statement of the terms and limitations of the said act of Congress will be found in the Record on page 56. See act of Congress approved April 5th, 1872.

The plain unequivocal terms of said act, limit the location of the scrip thereby created upon the UNOCCUPIED and UNAPPROPRIATED public lands of the United States, not mineral."

The plaintiff in error, as defendant in the State trial court, alleged in his said amended equitable plea, See page 55 of the Record) that the land in question "was situated in the Fort Brooke Military reservation of Florida, and that the plaintiff claimed title to said lands through a patent issued to Louis J Brush, the plaintiff's grantor. That the land sued for was situated within the Fort Brooke Military reservation of the United States, at Tampa Florida, and that the plaintiff claimed title to the same by virtue of the patent predicated upon a pretended location, and entry on said land made in the United States land office at Gainesville, Florida, by said Brush with Valentine scrip, that at the time of said location and entry of said land, and at the time of the said issuance of the said patent to the said Brush, the defendant was in actual occupancy and possession of the said land, and was residing upon it with his family as a home.

That defendant had settled upon, and was in the actual possession of the said land, it being a portion of said Fort Brooke Military reservation, prior to the location of said reservation in the year 1877, and prior to the said location of the said reservation in the year 1878, and had settled thereon prior to January first 1884 in good faith, for the purpose of securing a home, and of entering the same under the general land laws of the United States, and continued in such occupancy from a period prior to the first of January 1884, to the time of the approval of the act of Congress of July 5th, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience, is entitled to the exclusive right of possession thereof. That at the time of said pretended location and entry of said land with Valentine scrip by the plaintiff's grantor, and of the issuance of said patent to him, said land was occupied by the defendant as aforesaid and was appropriated, and was not then and is not now "Unoccupied and Unappropriated,' public land of the United States as required, specified and limited by the act of Congress (of April 5th, 1872) in such case made and provided which authorizes the location of such scrip, That at the time of the said pretended entry of said land and of the issuance of said patent to the plaintiff's grantor, said land had not been surveyed under the direction and control of the

general land office of the United States, and that said entry was made upon tracts of less than the subdivision provided for in the United States land laws, and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip and of the issuance of said patent to the plaintiff's grantor, said land was within the jurisdiction of the war department of the United States, and not within the land department, and defendant alleged that said patent is in fraud and violation of the Acts of the Congress of the United States and of the right of the war department, and that said patent is void, and vests no legal or equitable title, nor right of possession in and to said land in the plaintiff and that defendant by virtue of said Acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of said land mentioned in the plaintiff's declaration."

The evident purpose of the above plea was to impeach the patent under which the plaintiff in the court below claimed title, and thereby to defend the title and the right of possession of said land claimed by the plaintiff in said action of ejectment.

The State trial court denied the defendant the right to file said amended equitable plea, on the grounds, that it is not sufficient as a plea on equitable grounds. (See Record page 7.)

This was equivalent to sustaining a demurrer to said amended equitable plea. (See Record page 55.)

The Supreme court of Florida in commenting on said plea on equitable grounds on page 57 of the Record, asks the pertinent question, "Does the plea set up any defence; and if so is it available to the defendant under the general issue or plea of "not guilty" in an action of ejectment?" And on page 60 of the Record the said Supreme court answers said questions, and holds that all the available defense sought to be set up by said equitable plea, could be relied upon as a legal defense under the general issue, if the defendant was in a position to attack the patent. (See Record page 60.)

We invite the consideration of this court to the first grounds in the assignment of error.

In our discussion of these first five grounds of errors assigned by the plaintiff in error, we contend in behalf of the plaintiff in error, that the grounds set up in said amended plea are good, both in law and in the equity, as defense to the said action of ejectment. (These five grounds in the assignment of errors are found on page 67 and page 68 of Record.)

The plaintiff in error, as defendant in the court below,

sought to impeach the said patent and the plaintiff's right of possession by alleging and proving that the land in question was entered with "Valentine scrip," in violation of the Act of Congress of April 5th, 1872. That the facts alleged in said plea show that said patent was illegal and void and that plaintiff had no title or right of possession in and to said lands and also that the plaintiff in error, as defendant in the State trial court had an inchoate equitable right to the land in question under the Acts of Congress in such cases made and provided. The Act of Congress of April 5th, 1872, chapter 89, of the 42nd. Congress 17 Stat, provides for the issuance of "Valentine" scrip, and limits its location to "unoccupied and unappropriated" public land of the United States, and confines its location to tracts of not less than the subdivisions provided for in the United States land laws.

The plea sets up that the patent of the plaintiff's grantor was predicated upon an entry with "Valentine" scrip, which was located upon the land in question; that said land was at the time of the location of said scrip upon it and of the issuance of the patent, situated in the Fort Brooke Military Reservation of the United States at Tampa, Florida, and that said land was then within the jurisdiction of the war department, and not within the jurisdiction of the land department of the United States, and that said land was not then "unoccupied" public land of the United States, but was then "occupied" by the defendant, who had settled upon it in good faith, and was residing upon it as his home, cultivating and improving it with the intention of entering it under the land laws of the United States, &c.

If these facts be true and available to the defendant in said action of ejectment, the said patent was illegal and void, and the State trial court, and the Supreme court of Florida erred in denying to the plaintiff in error the privilege and protection invoked by said plea under the Acts or Congress of April 5th, 1872, and July 5th. 1884.

If the land in question was "occupied" or was within the jurisdiction of the war department, the officer who issued the patent had no authority to do so, and the patent is void both at law and in equity. This doctrine is sustained by numerous decisions of this court. See Polk's Lessee vs. Wendal 9th, Cranch 87. The case of Patterson vs. Winn, 11th, Wheaton 380, is also in point. There, this court held as follows: "We may therefore assume as settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by Statute &c., it may be impeached collaterally in a court of

law, in an action of ejectment." See 11th, Wheaton 380. If a patent be obtained fraudulently or against law, it does not carry the legal title. See Stoddard vs. Chambers 2nd, How. 285. And if issued for land reserved from sale by law, it is void for want of authority.

The decision of the court on this subject are too numerous to be enumerated. We refer to some of them.

See, Polk's Lessee vs. Wendel, 9th, Cranch, 87; New Orleans vs. U. S. 10th, Pet. 730; Wilcox vs. Jackson 13th, Pet. 509; Stoddard vs. Chambers 2d, How. 317-318; Easton vs. Salisbury 21st, How. 428; Reichart vs. Felps, 6th, Wall. 160; Best vs. Polk, 18 Wall. 117; Railroad Co. vs. U. S. 92 U. S. 733. Newhall vs. Sanger, 92 U. S. 761; Sherman vs. Buick, 93 U. S. 209; Smelting Co. vs. Kemp, 104 U. S. 636; Steel vs. Smelting Co, 106 U. S. 447(1st, Supreme court reporter 389); Railway Co. vs. Dunmeyer, 113 U. S. 642, (5 Supreme court reporter 566); Reynolds vs. Mining Co. 116, U. S. 689, (6 Supreme court reporter 601); Moor vs. Robins, 6 Otto. 533; U. S. vs. Stone, 2 Wall. 535; Minter vs. Crommelin, 18 How. 87, and Doolan vs. Carr, 125 U. S. 618, (8 Supreme court reporter 1228.)

The rule is clearly established by the above authorities that a patent for land issued by the land department without authority of law, or that a patent for lands over which the land department has no jurisdiction, is absolutely void. And this court said in Doolan vs Carr above cited, "that even a patent from the government of the United States, issued with all the forms of law, may be shown by extrinsic evidence to be void, if it be such evidence as by its nature is capable of showing a want of authority for its issue".

With this criterion before us, we again revert to the allegations in said amended equitable plea, "that at the time of the location of said "Valentine" scrip and of the issuance of the patent, said lands was "Occupied" and was also at that time "not within the jurisdiction of the land department" but was within the jurisdiction of the war department."

These facts, which constitute the want of authority in the land department to issue said patent, and which would show that the said patents to the plaintiff's grantor was void, says this court in Doolan vs Carr 125 U. S. 618, may be shown by "extrinsic evidence," if it be such evidence as by its nature is capable of showing a want of authority in the land department to issue the patent.

We claim in behalf of the plaintiff in error, that in the light of the above authorities, the assignments of error on page 67 and 68 of the Record are well taken as to the invalidity of a

patent issued without authority of law or issued upon land not within the jurisdiction of the land department.

The Supreme court of Florida does not controvert that such a patent would be void. (See page 59 and 60 of the Record.

We contend that if the patent through which the plaintiff in ejectment claimed title was void, it is fatal to his recovery in an action of ejectment. For in ejectment the plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary.

But the Supreme court of Florida, winds up with the conclusion that although the facts set up in the said amended equitable plea strike at the very heart of the patent, and show that it is absolutely void, yet held that the defendant in the State trial court "was a mere trespasser" and not in a situation to attack the patent and therefore sustained a demurrer to the said equitable plea, and sustained the ruling of the trial court in ruling out the evidence offered by the defendant to sustain said plea. and thereby denied to the defendant the protection invoked through said plea, of the Acts of Congress applicable to said case. See Record pages 60, 61, 62 and 63.

The correctness of the said opinion and ruling of the said Supreme court of Florida is involved in the 1st, 2nd, 3rd, 4th and 5th, grounds of the assignment of errors. See Record pages 67 and 68.

The Supreme court of Florida, in its opinion on page 62 of the Record, holds that the plaintiff in error, the defendant in the State trial court, "at most was an occupier of lands of the United States without any right of entry and without any authority of law; and also holds that in this case, "there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right inchoate or otherwise, to enter the land." And, "that the defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a 'mere trespasser' upon the land, and, as such" continues the Supreme court of Florida, "we do not think he can be heard to question the legality of the patent issued by the land office. See Record page 62.

We contend in behalf of the plaintiff in error, that no act is a trespass, but that which is unlawful, and that a bona fide settler upon the lands of the United States, who with the intent to enter the same under the public land laws of the Unit-

ed States, has taken actual possession of such land, cultivated and improved the same, and resided thereon with his family, and made it his home, acts in harmony with the benificent policy of the government, and is not a trespasser.

He is not only not a trespasser, but he is in privity with the government and that such possession and occupancy by a bona fide settler will enable him to protect his possessions in the courts, not as against the government, but against other individuals, and which the land officers are bound to respect (See Clements against Warner 24 How. 394-397. This court in Frisbie vs Whitney, 9th Wall. p. 187, says, "Occupancy and improvement on the public lands with a view to preemption, do not confer a vested right in the land so occupied."

It does confer a preference over others in the purchase of such land by the bona fide settler which will enable him to protect his possession against other individuals, and which the land officers are bound to respect."

This inchoate right may be protected by the courts against the claim of other persons who have not an equal or superior right, but it is not valid against the United States. (9th Wall 187).

There was no contest in this case between the plaintiff in error and the government.

But the plaintiff in error, as defendant in the State trial court of Florida, sought to establish, as a defense to said action of ejectment a superior claim to said land, as against the plaintiff in the said action, claiming, as against said plaintiff, that by reason of the facts set up in said equitable plea, the patent through which the plaintiff claimed title was void, and that under the policy of the government, and the acts of Congress in such cases made and provided, he had an inchoate right to the land in question, which, in equity and good conscience, under the direction and decree of the courts, ought to ripen into a perfect title to the said land. Here, then, is the issue presented to this court. The Supreme court of Florida says in its opinion that even if the patent to the plaintiff's grantor was void by reason of the facts set up in said equitable plea, the defendant in the State trial court could not attack it, because "said defendant bases his right to the land on settlement and occupancy under the act of Congress of July 5th, 1884, and his right to make a homestead entry, and it will be observed that the rights given to settlers in the first proviso of the act is coupled with the further proviso, that the land was subject to entry under the public land laws at the time of its withdrawal," and, that "There was no showing made, or offered to be made, that the Fort Brooke

reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation." See pp. 60 & 62 of the Record."

And hence the Supreme court of Florida concludes, that because the defendant in the trial court did not prove, or offer evidence to prove that the Fort Brooke reservation at Tampa, Florida, under the 2nd proviso, of the Act of Congress of July 5th, 1884. was subject to entry under any of the public land laws when it was withdrawn for a reservation, the defendant could acquire no right by virtue of said Act of Congress of July 5th, 1884, and "at most, he was an occupier of lands of the United States without any right of entry and without any authority of law," "and that the defendant's claim is not shown to have been in privity with the government's title, there being no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by 'homestead' entry, or that the defendant had acquired any right, inchoate or otherwise, to enter the land." See Record page 62. And for the reason above expressed, the Supreme court of Florida adjudged that the plaintiff in error, as defendant in the State trial court, was "a mere trespasser" upon the land," and could not be heard to question the legality of the patent issued by the land office." See Record page 62.

It is our task in behalf of the plaintiff in error to satisfy this court that the above opinion and ruling of the Supreme court of Florida is erroneous.

In our argument of this branch of the case, we respectfully refer this court to the amended equitable plea, set out on page 55 of the Record.

The Supreme court of Florida, while it admits the sufficiency of the grounds set up in said plea, bases its adverse decision to the plaintiff in error solely upon its construction of the Act of Congress of July 5th, 1884, that there being no distinct allegation in the plea that the land was subject to entry under the public land laws at the time of its withdrawal as required by the 2nd, proviso, of the said Act of Congress of July 5th, 1884, (See Record page 60); and no showing made or offered to be made by the defendant in the State trial court that the Fort Brooke reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation. See page 62 of the Record, and that therefore the defendant had no inchoate or other right to said land by virtue of the facts set up in said plea," "and was a mere trespasser, and could not be heard to impeach the patent."

This brings us to a consideration of the Act of Congress of July 5th, 1884 (23 Stat. 103.).

This is an act to provide for the disposal of abandoned and useless Military reservations, and repealed all other acts on the subject.

There is a saving clause in said act for settlers contained in the first proviso of the 2nd section of said act, which is as follows; "Provided, that any settler who was in actual occupation of any portion of any such reservation, prior to the location of such reservation, or settled thereon prior to January 1st, 1884, in good faith for the purpose of securing a home and entering the same under the general land laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding 160 acres in a body, according to the government surveys and subdivisions. Provided, further, That said lands were subject to entry under the public land laws at the time of their withdrawal." See Act of Congress of July 5th, 1884 (23 Stat. 103).

The plaintiff in error, as defendant in said State trial court, pleaded such facts as entitle him to the protection of the first proviso in the second section of said Act of Congress. But the Supreme court of Florida denied to the plaintiff in error every defence sought to be interposed in said suit on the grounds "that there is no distinct allegation (in said plea) that the land was subject to entry under the public land laws at the time of its withdrawal and no proof of the same. We submit that the plea did allege that the defendant was entitled to enter said land under the terms and conditions of the said Act of Congress of July 5th, 1884, which was equivalent to an allegation that the land was such land as was contemplated by the Act, viz, that it was subject to entry under the land laws at the time of its withdrawal.

That there was no showing made, or offered to be made, that the Fort Brooke reservation at Tampa, was ever subject to entry under the public land laws, when it was withdrawn for a reservation, is, we submit, not a provable fact, but a question involving the legal status of said reservation at the time of its withdrawal (from the public domain) or the creation of said reservation.

We respectfully submit that the Fort Brooke Military reservation of Florida was created by the proclamation of the President on the 10th day of December, 1830.

The power of the President to withdraw land from the public domain, or to create a reservation by executive order, is

not an open question. See Grisar vs. McDowell, 6 Wall. 381.

The lands embraced in the Fort Brooke reservation at Tampa were "withdrawn" or reserved by executive order of the President on the 10th day of December, 1830. The question then arises, what was the legal status of the land at and before that time? Was it then subject to entry under the public land laws of the United States?

The land was in Florida and within the public domain of the United States, ceded to the United States, by virtue of the Treaty of 1819, between the United States and Spain. It became subject to entry under the public land laws of the United States by the Act of Congress approved April 22, 1826 (4th Stat. 154-155).

This court will observe that this Act of Congress of April 22, 1826, by its terms is specially and solely applicable to the territory of Florida and subjected the whole of Florida, excepting land reserved for school to entry. So that by the said Act of Congress of 1826, the land embraced in the Fort Brooke Military reservation at Tampa, Florida, was subject to entry under the public land laws, at the time of the executive order creating said reservation, to wit, on the 10th day of December, 1830, when it was "withdrawn".

Therefore, the conclusion is inevitable that the Supreme court of Florida erred in its ruling, on page 62 of the Record, holding that "There was no showing made, or offered to be made, that the Fort Brooke reservation, at Tampa, was ever subject to entry under any of the public land laws when it was "withdrawn for a reservation," and that "The defendant's claim is not shown to have been in privity with the government's title, in any way," "and his adverse holding, under the showing made places him in the attitude of a mere trespasser "upon the land," and as such, he could not be heard to question the legality of the patent," and in holding that "there was no showing that the defendant had acquired any right, 'inchoate' or otherwise, to enter the land."

Upon this fallacious structure, built upon an absolute disregard of the Act of Congress of the 22nd of April, 1826, as applied to the Act of Congress of July 5th, 1884, the Supreme court of Florida upholds and sustains the trial court in its violation of the plain principles of law applicable to the case, and sweeps away from the defendant in the trial court the protection which he sought under the laws of the United States. See page 63 of the Record.

This same position assumed by the Supreme court of Florida, that a defendant in the court below could not attack the patent, or could not in defence of his possession show a de-

fect in the plaintiff's title, on the ground that the defendant had shown no right whatever, but were in possession as "naked trespassers" was taken by the trial court in the case of Reynolds vs. Mining Co., 116 U. S. 687. But this court held that this ruling was erroneous, and, "that, as in all other actions of ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's." See also Doolan vs. Carr, 125 U. S. 618, and authorities cited; Knight vs. U. S. Land Association 142 U. S. 161; Foss vs. Hinkell, 78 Cal. 158.

Under the plea in this case the plaintiff in error was a bona fide settler upon the land in question, had settled upon it in good faith with the honest purpose of entering it under the general land laws, was in possession and occupancy of it as his home when the plaintiff's grantor entered it with Valentine Scrip, contrary to the Act of Congress which created such scrip.

We claim in behalf of the plaintiff in error that his settlement upon the land in question was never hostile or adverse to the government, but was in harmony with the beneficent policy of the government towards the settler upon the public lands. We do not controvert the unquestioned right of the government to dispose of its lands under Congressional legislation. But we claim that having settled on the land by the permission and encouragement of the government we have a right in the courts to impeach a patent, illegally issued to the plaintiff's grantor while we were in the occupancy of the land. It was held in Lichfield vs. The Register and Receiver 1st Woolworth's Circuit court reports 299, that "settlers upon the public lands, under preemption and homestead laws, have an inchoate right, which they should be permitted to perfect into a legal title."

The plaintiff in error actuated by the honest belief that the land was at the time of his settlement still segregated, as a part of the Fort Brooke reservation, settled upon it and made his home upon it, under the honest belief that it was no longer of any use as such reservation to the government, and would soon be released to the Land Department, and with the honest intention of entering it under the general land laws, claims the protection of the principle enunciated by Mr. Justice Brewer in delivering the opinion of this court in Lake Superior Ship Canal, Railway & Iron Co. vs. Cunningham, 15 Supreme Court Reporter page 115. In this anticipation he was not mistaken. For the Act of July 5th, 1884, (23. Statute page 103) which followed his settlement, corroberated his anticipation, and adhering to the long established

policy of the government, made provision for the protection of such settlers. 23 Stat. 103.

Our case is not distinguishable in principle from the above cited (Lake Superior Ship Canal, Railway & Iron Co. vs. Cunningham 15 Supreme Court Reporter 115) in which Mr. Justice Brewer, speaking for this court. said. "But legislation respecting public lands is to be construed favorably to the actual settler." "If a party entering upon a tract, although he knew that it was within the limit of an old railroad grant, did so under the honest belief and expectation that that grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary, that Congress would shortly resume it, and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this conformatory act a bona fide claimant of a homestead," 15 Supreme court reporter 115, and approved in R. R. Co. vs. Osborn 160 U. S. p. 103 (16 Sup. court reporter 219).

Our case is identical in principle with the above opinion of this court and if we have met all the requirements of the said Acts of Congress of July 5th, 1884, we are in privity with the government and entitled to be permitted to perfect our inchoate title into a perfect legal title.

We have set up no claim to vested rights against the government. But we do claim that by virtue of our prior bona fide settlement, occupancy, inhabitancy, and improvement of the land in question. as against one whose subsequent entry and patent granted to the plaintiff's grantor in the violation of law, we are under the protection of the laws of Congress, whose benign policy towards the settler has been frequently declared by this court. See Shepley vs. Cowan, 91 U. S. 330-338; Frisbie vs. Whitney, 9 Wallace 187, and the "Yosemite" Valley cases 15, Wall. 78. In the latter case, this court (15 Wall. page 78 & 87), construing the preemption laws as to the rights of a settler, says, "The United States by the preemption laws do not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale." "They simply declare by those laws that in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to the parties who have settled upon and improved them," and also Buxton vs. Travers 103 U. S. 235 (9 Sup. court reporter 509).

In the case of Shepley vs. Cowan, 91 U. S. 330-338, this

court said: "But while according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property." See also 18 Wall, 313, 314 and 315 Supreme court Report pp. 408 and 785.

This case, under the facts set out in the equitable plea is similar as to the right of the settler, to the case of the United States vs. Mo., K. and T. Railway Co.; 141 U. S. 358 (12 Supreme court Reporter 13). In the case just cited, Mr. Justice Harland, speaking for this court, after alluding to the allegation of the settlement and improvement similar in principle to the allegations of the plea in this case says, "If the facts are as thus alleged, it is clear that the Missouri Kansas company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to bona fide settlers, who acquired rights under the homestead and preemption laws, which were not lost by reason of the land department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company." See 141 U. S. 358 et seq."

The plaintiff in error as defendant set up in his said equitable plea, that at the time of the entry of the land by the plaintiff's grantor with Valentine scrip and of the issuance of the patent the said defendant was in the actual occupancy of said land. If this was true, then the land department by mistake or erroneous interpretation of the Act of Congress of April 5th, 1872 (17 Stat.) which prohibited the location of Valentine scrip on occupied land) violated said Act of Congress in issuing a patent upon such location to the plaintiff's grantor, and such patent, being issued without authority of law, was void, void for want of authority, and this, without any allegation or proof of the bona fides of such occupancy is a good defense of itself in ejectment. See Act of Congress of April 5th, 1872 (17 Stat).

The defendant in error claimed title through an entry of the land with Valentine scrip through a patent issued to his grantor under the Congressional grant to said Valentine of April 5th, 1872. "Occupied" land was excepted from entry with Valentine scrip under this Act of April 5th, 1872. See Atherton vs. Fowler 96 U. S. (6 Otto) pp. 519-520. The plaintiff in the State trial court claimed title through a patent issued to his grantor under this Act of Congress. The defendant in the trial court, as one of the grounds of defense,

claimed that at the time of such entry of said land with Valentine scrip, and of the issuance of the patent, it was not "unoccupied," but was then in the actual occupancy of the defendant. The defendant sought to prove and did prove in said trial that at that time he was in actual occupancy of said land. See Record page 28, 29 and 32. In Railroad Company vs. Smith, 9 Wall. page 99, this court says; "Now, when a party claiming under that grant sued to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class (covered by the first grant and excepted from the second), namely, so swampy, overflowed and wet as that the major part of the tract was unfit for cultivation?" Says this court (9 Wall. page 100). "The matter to be shown is one of observation and examination," viz: "was the land swampy, overflowed and wet, and unfit for cultivation?" In our case, the question is, was the land "unoccupied?" This, says this court in the above cited case, is a matter to be shown by parol proof. If it was occupied it was excepted from entry under the Act of Congress of April 5th, 1872, with Valentine scrip, and the patent was void, void because issued in violation of the Act of Congress of April 5th, 1872, (17 Stat.).

This of itself was a good and sufficient defense to this suit in the State court. See Samson vs. Smiley, 13 Wall. 91 and 92; and Doolan vs. Carr, 125 U. S. 618 et Seq. (8 Supreme court Reporter 1234). This defense, which the plaintiff in error interposed in the State trial court was entirely ignored, and the protection and privilege claimed by him under the Act of Congress of April 5th, 1872, was denied by the Supreme court of Florida. See Record pages 59 and 61. This brings us to the consideration of the sixth error assigned (See pages 68 and 69 of the Record). This involves the correctness of the charges given to the jury by the State trial court at the instance of the plaintiff in said action of ejectment. See Record pages 36 and 37. These were most remarkable charges. Taken together, these charges tell the jury that in an action of ejectment, where the plaintiff relies upon a patent of the government, there can be no defense by the defendant except to produce in evidence a legal title older than the patent of the plaintiff, or in other words, that a patent could not be impeached in such an action by showing that it was illegally or fraudulently issued in the land department, or that the land department had no jurisdiction to issue the patent. These charges clearly ignore the uniform and numerous decisions of this court from the time of Polks Lessee vs. Wen-

dal down to the present time. And in giving such charges, said trial judge had no respect for the fundamental principles of law applicable to actions of ejectment, and absolutely disregarded the Acts of Congress of April 5th, 1872, (17 Stat.) and of July 5th, 1884, under which the defendant sought to defend said action of ejectment.

The 7th and 8th errors assigned involved the correctness of the ruling of the trial court in refusing to give to the jury the charges asked for by the plaintiff in error as defendant in said trial court. See pages 69 and 70 and also pages 37 and 38 of the Record.

We beg to make the same comment upon the refusal of the trial judge to give these charges, as we have made upon his giving the above charges for the plaintiff.

The 9th error assigned is as follows. "That the Supreme court of Florida erred in affirming the judgment of the State trial court because said trial court excluded such evidence as tended to prove said equitable and said amended equitable plea." See page 70 of the Record.

These pleas are found on pages 3, 5 and 6 of the Record, and the substance of the defense set up in said pleas is contained in the opinion of the Supreme court of Florida on pages 55 and 56 of the Record.

The Supreme court of Florida on pages 61 et seq. of the Record discussed such evidence as was offered by the defendant in the trial court as tended to prove said equitable pleas. And on pages 61 and 63 of the Record the said Supreme court of Florida justified the trial court in refusing to admit such evidence, because, as it said, "The defendant not being in a situation to call in question the patent issued to the plaintiff's grantor, the (trial) court did not err in excluding the evidence offered for such purpose."

One of the purposes of the defendant in offering the documentory evidence alluded to on page 61 of the Record was to show that the land in 1877 was, by the proper executive order, reserved, or "withdrawn," and that it remained "withdrawn," or segregated until the patent was issued to the plaintiff's grantor in the year 1882, and that it was never released to the land department until the passage of the Act of Congress of July 5th, 1884.

Another purpose was to show that the land was "withdrawn," in the year 1877. And this for the purpose of meeting the requirement of the 2nd, proviso of the Act of Congress of July 5th, 1884, viz.: "Provided further, That said lands were subject to entry under the public land laws at the time of their "withdrawal." This evidence will be found on

page 19 et seq. of the Record. By the exclusion of this evidence it will be seen that the plaintiff in error was prevented from showing the very fact, the absence of which was sufficient, in the opinion of the Supreme court of Florida, to justify a denial of any defense offered by the defendant in the trial court.

The reasoning of that court is, that the defendant could not impeach the patent because he was not in privity with the government, and was a mere trespasser "upon the land," because he claimed, under the Act of Congress of July 5th, 1884, and had not shown, as required by that Act, that the land was subject to entry under the public land laws at the time of its "withdrawn" for a reservation.

Thus, it will be seen, that we were not allowed to show this fact, and were condemned because, says the Supreme court of Florida, we did not show it. See pages 62 and 63 of the Record.

We claim that a new reservation of "Fort Brooke" was created, or that the land was "withdrawn," by executive order, in 1877, and that at that time it was subject to entry under the public land laws, viz: the homestead and preemption laws which were then in full force. See Act of Congress of June 21, 1866, Chap. 127. Sec. I, or see Rev. Stats. of the U. S. Sec. 2303, so that whether, under a proper construction of the Act of Congress of July 5th, 1884, if the Fort Brooke reservation was "withdrawn" by executive order of Dec. 10, 1830, it was then subject to entry under the public land laws, to-wit: The Act of Congress of April 22, 1826, (4 Stat. pages 154 and 155) or the homestead laws. And if it was withdrawn in 1877 it was then subject to entry under the public land laws, to-wit, the homestead and preemption laws, which were then in full force. See Rev. Stats., Sec. 2303. Therefore the plaintiff in error claimed that he had an inchoate right to the land in question, under the Act of Congress of July 5th, 1884, was denied the right to make any defense to said action of ejectment by the Supreme court of Florida, upon the untenable assumption of that court "that the land was not subject to entry under the public land laws at the time of their "withdrawal." See Record page 62.

The 10th, and last ground specified in the assignment of errors involves a consideration of the refusal of the State trial court to grant a new trial on the grounds set out in the motion for a new trial, See Record pages 40 and 41.

We will only invite this court to a consideration of the fourth ground of the motion for a new trial, inasmuch as all the other grounds are embraced in our argument upon the

other points in the assignment of errors.

The said fourth ground of the motion is as follows: "Because the court erred in admitting in evidence the patent to Louis J. Brush, it appearing upon the face of said patent that it was obtained with, and predicated upon Valentine scrip, and that said land is a part of Fort Brooke Military reservation at Tampa, Florida." The patent is set out in totidem verbis" on pages 14 and 15 of the Record.

It appears upon the face of the said patent itself that it was predicated upon scrip located under the Act of Congress of April 5th, 1872, entitled an Act for the Relief of Thomas B. Valentine. Referring to said Act of April 5th, 1872, in third section thereof, it will be seen that it limits the location of Valentine scrip upon the "unoccupied," and "unappropriated" public lands of the United States, "not mineral," and in tracts not less than the subdivisions provided for in the United States land laws, and, if surveyed, when taken, to conform, when surveyed, to the general system of United States land surveys.

For the reasons assigned in our objection to the admission of the patent in evidence. See Record pages 15 and 16.

It is apparent upon the face of the patent that it was predicated upon the Valentine scrip, and issued under the Act of Congress of April 5th, 1872 (17 Stat.). We claim also that it appears from the face of the patent from the description of the land therein that said land was situated in the Fort Brooke reservation.

The land, as described in the patent, is described as "lot number eight, of section nineteen in township twenty-nine, south range nineteen east, and the lot number seven, of section twenty-four, in township twenty-nine south, of range eighteen east, of Tallahassee meridian, in district of lands subject to sale at Gainesville, Florida, containing forty acres and nineteen hundredths of an acre." See Record pages 14 and 15.

The records in the land department show that this land was withdrawn by executive order of the 22nd of January, 1877, and was not restored until the passage of the Act of Congress July 5th, 1884. See Record pages 22 et seq.

This land being reserved by executive order of the 22nd of January, 1877, (See Record page 22) the withdrawal of the 29th of May, 1878, did not restore it to the public domain by creating a new reservation of part of the same land embraced in executive order of January 22nd, 1877. When land is once withdrawn, it can only be restored in the manner prescribed by Congressional legislation. The Act of Congress

of August 18th, 1856, (11th Stat. 87) provided as follows. "That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under the control of the general land office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: Provided, That said lands shall not be placed under the control of said general land office until said opinion of the Secretary of War, giving his consent communicated to the Secretary of the Interior in writing shall be filed and recorded." See Act of Congress of August 18th, 1856 (11th Stat. page 87).

We submit that there was no legal restoration of the land embraced in the patent until the passage of the Act of Congress of July 5th, 1884. We are therefore driven to the conclusion that in 1882, when the patent issued to the plaintiff's grantor, the land was not within the jurisdiction of the land department, and that the patent was therefore void.

The Act of Congress of July 5th, 1884, provided for the disposition of useless and abandoned military reservations restored all of Fort Brooke reservation which had not prior to the passage of said Act been legally turned over, or released, by the War Department to the Land Department. The plaintiff in error claims the protection of the said Act of July 5th, 1884, and seeks in this court such a judgment as will perfect his inchoate equitable right into a perfect legal title. We claim the benefit of the principle announced by Mr. Justice Shiras in delivering the opinion of this court recently in the case of Hendrick vs Atchison, T. & S. F. R. Co., 17th Supreme court Reporter, p. 925. He there said: "The holder of a legal title in bad faith must always yield to a superior equity." The patent vested in him the legal title, but it did not determine the equitable relations between him and third persons. 17th Sup. court Rep. 925, and authorities cited.

As to what judgment or decree in favor of the plaintiff in error would be proper, under the circumstances of this case, we respectfully submit to the descretion of this court.

Respectfully submitted,

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